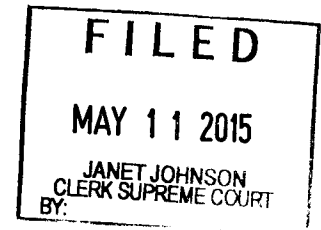


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MAY 11 2015

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CLERK SUPREME COURT

### SUPREME COURT OF ARIZONA

In the Matter of:	)	Arizona Supreme Court
	)	No. R-15-0018
PETITION TO AMEND RULES 31, 34,	)	
38, 39, and 42, Rules of the Supreme Court	)	Comment in Opposition
	)	
	)	

The Presiding Judge of the Maricopa County Justice Courts undersigned requests this Court to decline the proposed amendment to Rule 31(d)(25) of the Rules of the Supreme Court. The Limited Jurisdiction Courts Committee, on which the undersigned serves, joins in this request. Adoption of the proposed amendment would prohibit a current, beneficial practice whereby Justice Court mediators prepare written mediation agreements, even though these mediators are neither members of the bar nor certified legal document preparers.

**I. Background: The Existing Mediation Program in Maricopa County Justice Courts.** There are twenty-six Justice Courts in Maricopa County. Many of these courts have mediation programs. Other courts see the success of those mediation programs and are contemplating implementation of their own programs.

The four Justice Courts at the Northeast Regional Court Center (NERC) in Phoenix (Desert Ridge, Dreamy Draw, McDowell Mountain, and Moon Valley), provide an example of a long-term, successful mediation program in the Arizona Justice Court system. These four co-located courts set all regular civil cases for mediation if the cases are not otherwise disposed of by default or by motions for summary judgment or judgment on the pleadings. Judges and court managers in those four courts believe that at least 50% of these cases are successfully mediated and settled. Some of these cases are resolved well in advance of the targets of the newly established case processing time standards.

The NERC Justice Courts utilize two different groups of mediators. Both groups consist of volunteers who receive no compensation or reimbursement of expenses for performing their services.

The first group, which has handled the courts' mediations for over ten years, is composed primarily of retired business professionals, some with a master's degree that includes coursework on Alternative Dispute Resolution. This group has approximately 40 mediators, each of whom are required to take a minimum of 15 cases each year. So they are handling at least 600 cases, expending at least 900 volunteer hours, and resolving at least 300 cases each year. Before becoming a Justice Court mediator, these individuals must first complete a 40 hour mediation

training program, which is most often provided by the Arizona Attorney General Mediation Training Program. Before being allowed to attend the Arizona Attorney General Mediation training, applicants must be fingerprinted and submit to a criminal background check.

Volunteers who wish to participate in the Maricopa County Justice Court Mediation Program must be fingerprinted again, submit to another criminal background check, and show that they have successfully completed the Arizona Attorney General Mediation Training Program. Successful volunteers are then annually approved by the Maricopa County Justice Courts' bench. To qualify for continuing participation in the program, these volunteers agree to do at least fifteen mediations and attend five hours of COJET training per year, including one hour of ethics training.

Because these volunteers have a strong commitment to the courts and to resolution of their assigned cases, it is not uncommon for these individuals to attend training sessions beyond the basic requirements. These mediators operate under the direct supervision of the judges, and they have many years' experience with mediation theory and practice, as well as an understanding of the courts' operating procedures.

The second group of mediators arises from an association of the four NERC Justice Courts with the Sandra Day O'Connor School of Law's Lodestar Mediation

Clinic. This Clinic allows law students an opportunity to gain mediation experience under the supervision of law school faculty and the judges. In this Clinic are 18 law students over the course of the academic year. Each student does at least 12 mediations during the semester. So, in this Clinic at least 216 cases are processed, 324 hours of volunteer time are expended, and at least 108 cases are resolved. Quoting from the Lodestar Mediation Clinic website, the students are subject to rigorous training:

The Lodestar Mediation Clinic, an integral component of the nationally recognized Lodestar Dispute Resolution Program, helps students learn about alternatives to litigation while gaining practical experience about the mediation process. Student attorneys experience an intensive training program focusing on the theory, strategy and skills involved in the mediation of legal disputes, then act as mediators in civil (non-family) cases.

The Clinic has three mandatory training sessions that are typically scheduled prior to the start of semester, in addition to required class meetings. Students should expect to spend an average of 4-5 hours per week on out-of-class assignments in the last two-thirds of the semester. These assignments primarily are serving as a co-mediator in the Maricopa County Justice Courts, observing professional mediations, or participating in other dispute resolution programs on and off campus.

The Clinic is a 5 credit class and satisfies the graduation writing requirement, as the class assignments include a 25-page research paper.

( <http://www.maricopa.edu/lodestar/mediation-clinic> )

In the event of an unsuccessful outcome in the mediation setting, the NERC Justice Courts ask their mediators to perform basic pre-trial management functions while the parties are at the courthouse, such as:

1. Setting firm trial dates, and providing a hard copy of a “Notice of Trial Date” to the parties;
2. Cooperatively establishing deadlines for discovery;
3. Providing basic trial procedure information to self represented litigants, such as the order of the proceedings, how to prepare exhibits, the necessity for any witnesses to appear in person, and appeals information.

Even in “unsuccessful” mediation settings, Justice Court judges have found the litigants to be better prepared for trial because of the procedural information provided to them by the mediators. Equally important is that the mediation process provides the parties (particularly self-represented litigants) an opportunity to better define and understand those issues in dispute. As a result, the parties at trial are better organized and are able to use their time more effectively and efficiently. It is also not uncommon for self-represented litigants, who have come to understand the “real world” requirements of trial through the work of the Justice Court mediators, to revisit possibilities for settlement.

## **II. The Unnecessary Adverse Impact of the Proposed Rule Change.**

Undersigned recognizes there may be cogent reasons to strengthen the regulation

of mediators operating outside an established court litigation calendar. The problem is that the proposed rule change would destroy the Justice Court mediation program. Few, and perhaps none, of the mediators in the existing Justice Court program are members of the bar or certified document preparers. The Justices of the Peace at NERC do not believe that any of their mediators will obtain those additional qualifications in order to continue to participate in the mediation program. In other words, the mediation at NERC of at least 816 cases each year, with the expenditure of at least 1,224 volunteer hours and the successful, peaceful resolution of at least 408 cases, would all be lost. And this lost only represents four of the 26 Justice Courts in Maricopa County.

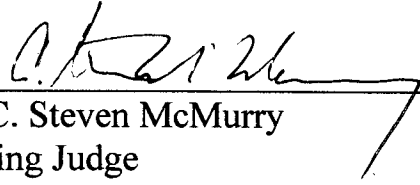
Adopting the proposed rule change would likely diminish access to justice for many citizens, contrary to the stated direction of the Chief Justice's Strategic Plan. Justice Court jurisdiction is limited to \$10,000. A typical justice court case that is sent to mediation is a credit card collection case of \$5,000 or less. The defendant cannot and will not hire an attorney. The typical defense is that they owe the money but they cannot afford to pay. The typical mediation agreement is a payment plan with the plaintiff waiving attorney fees.

Absent the current court-administered and monitored mediation program, consisting of highly-trained volunteers, the typical defendant will likely end up losing a dispositive motion or at a trial, which generates additional attorney fees

for the plaintiff. The plaintiff then obtains a judgment for the full balance plus the additional attorney fees, which can range between \$400 and \$2700. This result diminishes, not enhances, the defendant's access to justice.

**III. Conclusion.** The language of Rule 31(d)(25) should assure continuation of the current practice, in which a Justice Court mediator may help prepare a written mediation agreement, without imposition of the additional requirement that the mediator be a member of the bar or a certified document preparer.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of May, 2015.

By   
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